IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 310

GLEN F. DASTUGUE,

Petitioner,

versus

AMERICAN OIL COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 316 F. 2d 507.

JURISDICTION

While this Court has discretionary jurisdiction of the application for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit made within 90 days of the date of the opinion below, respondent submits that said jurisdiction should not be exercised.

QUESTION PRESENTED

Should this Court review the opinion below holding that the Trial Court erred in:

(1) instructing the jury on petitioner's claim for loss of earnings when there was no proof of loss of earnings in the record, and

(2) its manifest acceptance, as the chief basis of liability, of a parish (county) ordinance inapplicable to the case developed in the trial as revealed by the record.

STATEMENT

This is a civil action based upon diversity of citizenship, in which petitioner, Glen F. Dastugue, a Louisiana citizen, seeks to recover a money judgment from respondent, American Oil Company, a corporation organized under the laws of Maryland.

Petitioner was employed as a service station attendant by the lessee-operator of "Dick's H and H Amoco Service Station", located on the Jefferson Highway near Harahan, Louisiana. The lessee-operator occupied the station under a written lease from respondent, the owner of the station.

On January 23, 1961, at approximately 7:00 p.m., petitioner undertook to clean the office of the service station with gasoline. After pumping gasoline into a large can, he took the can of gasoline into the station office, and, using an ordinary mop, began "sloshing" it around the office floor.

Petitioner swore to two conflicting versions of what occurred next. On deposition, he said the gasoline fumes produced by his cleaning operation caught fire while he was mopping. At the trial, he said he had finished mopping and had gone outside to attend to a customer. When

he returned to the office to use the telephone, the fumes ignited. Petitioner was burned in the resultant fire.

The fumes which petitioner introduced into the office were ignited by the pilot light of a panel ray gas heater installed in a wall of the station office. Prior to cleaning with gasoline, petitioner had turned off the main burners of the heater, but failed to make certain that the pilot light was also off.

The complaint alleged that respondent was negligent because the pilot light continued to burn when the heater was turned off and because a window fan was inoperative.

In answer respondent denied that it was negligent and further alleged that the accident was proximately caused by the plaintiff's contributory negligence and assumption of risk in introducing gasoline fumes into the station office. Petitioner on several occasions had been specifically warned not to clean with gasoline.

The Trial Court denied respondent's motions for directed verdict made at the close of petitioner's case and at the close of all the evidence.

The jury trial below resulted in a general verdict for petitioner for $50,000. Motions for judgment notwithstanding the verdict or for a new trial were denied. Judgment was entered on the verdict, and respondent perfected its appeal.

The issues on appeal were respondent's right to judgment as a matter of law and, alternatively, its right to a reversal and remand for new trial in view of reversible errors committed by the Trial Court. The Court of Appeals for the Fifth Circuit reversed and remanded.

ARGUMENT

This action sounds in tort. Petitioner charges that respondent's negligence caused him injury. Respondent denies it was negligent, contending that petitioner's injury resulted from his own fault. The Fifth Circuit Court of Appeals found reversible error in the Trial Court's instructions to the jury and admission of certain evidence.

The issues thus presented are not unique. Neither are they of great importance to the general public. No judicial determination of the validity of a federal or state statute is involved. Petitioner has lost no right, title, privilege or immunity granted under the United States Constitution. Petitioner does not suggest an inability to obtain an impartial trial. He does not contend that there exists disharmony in the decisions of the various courts of appeals. There is no important and recurring question of law which should be settled by this Court. There is no conflict in the interpretation of federal law by concurrent state and federal jurisdiction.

Absent any of the above considerations, it seems clear that applications for a writ of certiorari made in cases involving limited questions like those involved in the instant case are improvident and should be denied, for

> "review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. * * * ". *Rule 19, United States Supreme Court.*

As Mr. Chief Justice Taft stated:

> " * * * it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there

> is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. The present case comes under neither head." *Layne & Bowler Corporation v. Western Well Works*, 261 U.S. 387, 393 (1923).

The principle thus stated in the *Layne* case has been consistently adhered to by this Court and recently emphatically reaffirmed. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

The petition for certiorari fails to focus on any issue justifying consideration by this Court. Petitioner cites neither authority indicative of error in the holding of the Court of Appeals, nor authority to persuade that the errors committed by the Trial Court were insufficient to justify reversal. The reason for this void is obvious. The decision reached on appeal is eminently correct.

The legal principles applied by the Court of Appeals are well established. Instructions to the jury must be confined to the issues raised by the pleadings and the facts developed by the evidence in support of the pleadings. It is reversible error to instruct the jury upon issues raised by the pleadings unless there is evidence introduced to support them: *Indianapolis and St. Louis Railway Company v. Horst*, 93 U.S. 291 (1876); *Mayor v. Ransom*, 23 How. 487, 64 U.S. 515 (1860); *Greyhound Corporation v. Ault*, 238 F. 2d 198 (5th Cir. 1956); *Carroll v. Magnolia Petroleum Company*, 223 F. 2d 657 (5th Cir. 1955); *Tharp v. Mundy*, 195 F. 2d 987 (5th Cir. 1952); *American Fire & Casualty Co. v. Jackson*, 187 F. 2d 379 (5th Cir. 1951); *Sinclair Refining Co. v. Tompkins*, 117 F. 2d 596 (5th Cir. 1941); *United States Cast Iron Pipe & Foundry Co. v. Eastham*, 237 Fed. 185 (5th Cir. 1916). This principle has been applied specifically to jury charges involving lost earnings in the absence of proof in the record. *Mayor v. Ransom, supra; Arkansas*

v. Godbehere, 261 F. 2d 623 (8th Cir. 1958); *Greyhound Corporation v. Ault*, *supra*; *Sinclair Refining Co. v. Tompkins*, *supra*; *Gaillard v. Boynton*, 70 F. 2d 552 (1st Cir. 1934); *United States Cast Iron Pipe & Foundry Co. v. Eastham*, *supra*. *Cf.*, *United States v. Gray*, 199 F. 2d 239 (10th Cir. 1952); *Louisiana Power & Light Co. v. Sutherland Specialty Co.*, 194 F. 2d 586 (5th Cir. 1952).

In holding that the Trial Court erred in admitting a parochial ordinance, the Court of Appeals likewise acted on clear legal authority and well established precedent. The questions of relevancy, materiality and admissibility are properly for the Court, not the jury. *Sinclair v. United States*, 279 U.S. 263 (1929); Wigmore on Evidence (3d ed.) § 2549, 2550.

It is clear that the discretionary jurisdiction of the Supreme Court is not to be exercised in cases which involve only the interpretation of facts bearing on causation or negligence. The Court of Appeals, in finding that reversible error was committed by the Trial Court, has not entered an opinion of interest to the public. On the contrary, this case is significant only to the parties litigant.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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